DEC 9
MICHAEL RODAK,

Supreme Court of the United States

October Term, 1974
No. 74-562

ARTIE MAHALEY, *et al.*,
Petitioners,

vs.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Respondents,

and

CITY OF EUCLID, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS CITY OF PARMA AND ITS MAYOR AND MEMBERS OF COUNCIL

ROBERT R. SOLTIS
Special Counsel
Parma City Hall
6611 Ridge Road
Parma, Ohio 44129
(216) 886-2323
Counsel for Respondents City of Parma and Its Mayor and Councilmen

Of Counsel:
ANDREW BOYKO
Solicitor, City of Parma

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Citation to Opinions Below 1
Jurisdiction 2
Question Presented for Review 2
Statute Involved 3
Statement of the Case 3
Reasons for Denying the Writ 5

1. The Decision of the Court of Appeals Is Consonant with the Decisions of This Court 6
2. The Court of Appeals Had Jurisdiction of a Final Appealable Order 8

Conclusion 9

TABLE OF AUTHORITIES

Cases

City of Kenosha v. Bruno, 412 U.S. 507 (1973) 5, 7
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949) 8
Gillespie v. United States Steel Corp., 379 U.S. 148 (1964) 5, 6, 8
Herbst v. International Telephone and Telegraph Corporation, 495 F.2d 1308 (2d Cir. 1974) 8
James v. Valtierra, 402 U.S. 137, 140 (1971) 5, 6, 7
Jetco Electric Industries, Inc. v. Gardiner, 473 F.2d 1228 (5th Cir. 1973) 8

Knickerbocker Toy Company, Inc. v. Faultless Starch Company, 467 F.2d 501 (Ct. of Customs & Pat. Apps. 1972) 8

Lindsey v. Normet, 405 U.S. 56 (1972) 5, 7

Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1245, 1250 (N.D. Ohio 1973) 2, 4

Mahaley v. Cuyahoga Metropolitan Housing Authority, 355 F. Supp. 1257 (N.D. Ohio 1973) 1, 4

Mahaley v. Cuyahoga Metropolitan Housing Authority, 500 F.2d 1087 (6th Cir. 1974) 1, 6, 8

Palmer v. Thompson, 403 U.S. 217 (1971) 5, 7

Plymouth Mut. L. Ins. Co. v. Illinois Mid-Continent L. Ins. Co., 378 F.2d 389 (3rd Cir. 1967) 8

United States v. Doe, 455 F.2d 1270 (1st Cir. 1972) 8

United States v. 58.16 Acres of Land, etc., 478 F.2d 1055 (7th Cir. 1973) 8

Statutes

28 U.S.C. § 1291 ..... 5, 8

42 U.S.C. § 1415 (7) 2, 3, 5, 6, 9

42 U.S.C. § 1983 ..... 3, 4, 7

Supreme Court of the United States

October Term, 1974
No. 74-562

ARTIE MAHALEY, *et al.*,
Petitioners,

vs.

CUYAHOGA METROPOLITAN HOUSING AUTHORITY, *et al.*,
Respondents,

and

CITY OF EUCLID, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS CITY OF PARMA AND ITS MAYOR AND MEMBERS OF COUNCIL

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 500 F.2d 1087 (6th Cir. 1974) (Petitioners' Appendix A1-A31). The opinion of the single-Judge District Court, upon which the appeal to the Court of Appeals was taken, is reported at 355 F. Supp. 1257 and reproduced in

the Petitioners' Appendix (A58-A80). The opinion of the three-Judge District Court, reported at 355 F. Supp. 1245 (Petitioners' Appendix A34-A57), is of pertinence here only insofar as it provides background for the issues decided below, inasmuch as that final decision was not appealed to this Court and is therefore res judicata.

JURISDICTION

The jurisdictional requisites adequately appear in the Petition.

QUESTION PRESENTED FOR REVIEW

Whether a single-Judge District Court has authority to order a public housing agency, which is a body politic and corporate under State law, to submit a plan setting forth the number of low-rent housing projects the agency intends to place in each of the five defendant cities when they have neither requested such projects nor voluntarily entered into a cooperation agreement required by 42 U.S.C. § 1415 (7), and when only an hour before a three-Judge Court in the same action and on the exact same evidence had found and determined that the cooperation agreement requirement is constitutional both on its face and as applied?

The Court of Appeals, one judge dissenting, ruled it had jurisdiction over the appeal filed by the five defendant cities and answered the question "No". Respondents submit that the answer of the Court of Appeals is correct and should not be reviewed.

STATUTE INVOLVED

The statute involved is set out in the Petition.

STATEMENT OF THE CASE

This action was filed by three Cleveland residents, who claim to be eligible for public housing, and an association interested in public housing named PATH. It was filed against Cuyahoga Metropolitan Housing Authority (CMHA), a public housing agency which is a body corporate and politic under Ohio law, members of its Board and its Executive Director; the cities of Euclid, Garfield Heights, Parma, Solon, and Westlake, Ohio, which are likewise bodies corporate and politic under Ohio law, and their respective Mayors and councilmen; the Department of Housing and Urban Development of the United States (HUD) and its then Secretary, George Romney. There are 56 municipal corporations within the territorial jurisdiction of CMHA. The five defendant cities' motion to join the other 51 municipal corporations as defendants was denied by the District Court.

On August 26, 1971, the District Court ordered plaintiffs' complaint dismissed as to the Executive Director and members of the Board of CMHA.

In the first count of the complaint, the plaintiffs attacked the constitutionality of the cooperation agreement requirement of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1415 (7). Count Two was brought under 42 U.S.C. § 1983 and alleged that the five municipalities had used the requirement to exclude plaintiffs and the class they represented from living in those munic-

ipalities. They prayed for an order directing CMHA to construct low-rent housing units in the five municipalities despite the cooperation agreement requirement of the Act.

A trial was conducted before the three-Judge Court convened to consider the constitutional aspects of the action. On February 22, 1973, in a signed Memorandum Opinion and Order stamped filed by the Clerk at 11:06 o'clock a.m., the three-Judge Court found and determined that the cooperation agreement requirement of the Act is "constitutional both on its face *and as applied*. . . ." (Emphasis added.) The order then dissolved the three-Judge panel and referred determination of Count Two to a single Judge to determine "whether the defendants' conduct violated the provisions of 42 U.S.C. § 1983". 355 F. Supp. 1250 (Petitioners' App. A43). One Judge dissented. On the same day, at 12:14 o'clock p.m., there was filed with the Clerk of the District Court a Memorandum Opinion and Order of the single Judge, in which he completely disposed of the issue referred to him by the three-Judge panel without further hearing or argument. The single Judge ordered CMHA "to prepare a plan setting forth the number of scattered site units it intends to place in each of the defendant suburbs . . . and should indicate the number of units which would be used to house those residents of the City of Cleveland who wish to move into that community." The plan was to be submitted to the District Court within 90 days by CMHA. The suburbs were given 90 days thereafter to object and give reasons if they had any why they cannot absorb the number CMHA desires to build there. The single Judge warned that if the suburbs' reasons in opposition to CMHA's plan were not constitutionally permissible and did not meet the compelling interest test, appropriate judicial action would be undertaken. (355 F. Supp. 1269, Petitioners' App. A79-A80).

Neither plaintiffs nor CMHA filed any appeal to this Court from the February 22, 1973 Order of the three-Judge Court determining that 42 U.S.C. § 1415 (7) is constitutional both on its face and as applied and entering judgment for defendants on Count One. That judgment became final when the time for appeal expired and is res judicata.

Defendants appealed to the Court of Appeals for the Sixth Circuit. The Court of Appeals on December 3, 1973 unanimously denied motions to dismiss the appeal for alleged lack of jurisdiction over a final order, filed by plaintiffs and CMHA, citing *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964). On the merits, the Court of Appeals reversed the judgment of the District Court and remanded the cause for dismissal of the Complaint. One judge dissented, and, although having concurred in overruling the motions to dismiss for alleged lack of jurisdiction, unilaterally brought up the matter again in his dissenting opinion.

CMHA, an appellee below, did not file in this Court any petition for a writ of certiorari. Only CMHA could be a contracting party to a cooperation agreement; petitioners would not be parties to any cooperation agreement with the defendant cities.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals on the merits is in harmony with and correctly applied the decisions of this Court in *James v. Valtierra*, 402 U.S. 137 (1971), *Palmer v. Thompson*, 403 U.S. 217 (1971), *Lindsey v. Normet*, 405 U.S. 56 (1972), and *City of Kenosha v. Bruno*, 412 U.S. 507 (1973). In determining that it had jurisdiction of the appeal under 28 U.S.C. § 1291, the Court of Appeals correctly

applied and followed *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), and is in accord with decisions in other circuits applying *Gillespie*.

Petitioners raise no issues of substance and demonstrate no special and important reasons warranting review. Instead, their Petition dwells on the findings of the District Court and contains a glaring error in the fourth paragraph on Page 21. The Court of Appeals did indeed dispute the findings of the District Court. At 500 F.2d 1087, 1091, footnote 3 (Petitioners' App. A9), the Court of Appeals clearly stated that "In our opinion, the findings of discrimination by the [District] Court are not supported by substantial evidence and are clearly erroneous."

1. The Decision of the Court of Appeals Is Consonant with the Decisions of This Court

In *James v. Valtierra*, 402 U.S. 137, 140 (1971), this Court construed the plain language of the Housing Act of 1937. 42 U.S.C. § 1415 (7), to mean exactly what it says:

> By the Housing Act of 1937 the Federal Government has offered aid to state and local governments for the creation of low-rent public housing. However, the federal legislation does not purport to require that local governments accept this or to outlaw local referendums on whether the aid should be accepted.

It is therefore clear that it is for the municipalities to decide whether they need low-rent housing and whether they desire to sign cooperation agreements. There is no basis to infer discrimination on the part of a body corporate and politic for doing what it has a lawful right to do under the express provisions of the federal housing Act. A district court has no authority to usurp the function expressly reserved to local governments, or to order a public housing

agency to prepare any plans for low-rent housing projects in municipalities which have neither requested them nor voluntarily signed cooperation agreements required for federal funding.

There is no constitutional right to public housing either in the municipality where a person resides or in a municipality in which he does not reside. The Constitution does not provide judicial remedies for every social and economic ill, and the assurance of adequate housing is a legislative, not judicial, function. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

City officials may close down a facility not touching a fundamental right, even though such action may have a greater impact on a minority group. *Palmer v. Thompson*, 403 U.S. 217 (1971). Surely a district court is not authorized to find a constitutional violation for a mere failure to provide public housing, so as to be able to invoke the court's awesome coercive and punitive powers against local governments which do not choose to accept federal aid. *Valtierra, supra.*

Moreover, the Court of Appeals was eminently correct in holding that a district court has no jurisdiction to issue orders against bodies corporate and politic like CMHA and defendant cities. *City of Kenosha v. Bruno*, 412 U.S. 507, 513 (1973). The Order issued in the action at bar was directed to CMHA (and not its officials against whom the complaint had been ordered dismissed previously) and only against the five cities. Lack of jurisdiction over bodies corporate and politic, which are not "persons" within the ambit of 42 U.S.C. § 1983, cannot be cured by joining as parties defendant the individual members of their governing bodies who have committed no constitutional violation and against whom nc relief has been or could properly be ordered.

2. The Court of Appeals Had Jurisdiction of a Final Appealable Order

In *Gillespie v. United States Steel Corporation*, 379 U.S. 148, 152 (1964), the Court held that "as this Court has often pointed out, a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case". This Court further held that "the requirement of finality is to be given a 'practical rather than a technical construction' ". That case further indicated that an Appellate Court should give consideration to four factors in determining whether an order of a lower court is "final" within the meaning of 28 U.S.C. § 1291. The Court of Appeals analyzed these four factors and applied them to the present case (Footnote 3, 500 F.2d 1087, 1091, Petitioners' App. Pages A7-A9). The Court of Appeals' trenchant analysis effectively disposes of Petitioners' argument that the order appealed from was not a final appealable order.

Decisions in the other Circuits following *Gillespie, supra*, and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), are consistent with the reasoning of the Court of Appeals in this action. *United States v. Doe*, 455 F.2d 1270 (1st Cir. 1972); *Herbst v. International Telephone & Telegraph Corporation*, 495 F.2d 1308 (2nd Cir. 1974); *Plymouth Mut. L. Ins. Co. v. Illinois Mid-Continent L. Ins. Co.*, 378 F.2d 389 (3rd Cir. 1967); *Jetco Electric Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973); *United States v. 58.16 Acres of Land, etc.*, 478 F.2d 1055 (7th Cir. 1973); *Knickerbocker Toy Company, Inc. v. Faultless Starch Company*, 467 F.2d 501 (Ct. of Customs & Pat. Apps. 1972).

CONCLUSION

The Court of Appeals faithfully followed and applied decisions and precedents of this Court in reversing an erroneous order of the single-Judge District Court and ordering dismissal of the complaint. No novel issues are raised by the Petition, and there are no special and important reasons warranting review of the clearly-correct decision of the Court of Appeals. Inasmuch as no appeal was taken from the three-Judge Court's Order which determined that the cooperation agreement requirement of 42 U.S.C. § 1415 (7) is constitutional on its face and *as applied*, that decision is final and is res judicata as between the parties hereto. Any statute must be applied before it can have an effect, and so it was clearly erroneous, as the Court of Appeals held, for the District Court to infer a discriminatory effect from a statute conclusively found to be constitutional as applied. Likewise, no constitutional violation may be inferred from a municipality's doing what a valid federal statute allows it to do. There was no error in the common-sense decision of the Court of Appeals. Since Petitioners have shown no basis for review, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT R. SOLTIS
Special Counsel
Parma City Hall
6611 Ridge Road
Parma, Ohio 44129
(216) 886-2323
Counsel for Respondents City of Parma and Its Mayor and Councilmen

Of Counsel:
ANDREW BOYKO
Solicitor, City of Parma